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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of MICHAEL and MELISSA PROUD.
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MICHAEL PROUD,
Appellant,
v.
MELISSA PROUD,
Respondent.

E058009

(Super.Ct.No. RID1202462)

OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry,
Judge. Dismissed in part; reversed in part and remanded with directions.

Michael Proud, Appellant in pro. per.

Hanke & Williams, Rick D. Williams, and Shelly L. Hanke for Respondent.

In this divorce proceeding, the trial court issued a restraining order against the husband, Michael Proud. At the same time, it gave the wife, Melissa Proud, legal and physical custody of the couple's child. Subsequently, it ordered Michael to pay Melissa temporary child support, temporary spousal support, and pendente lite attorney fees.

Michael appeals. We will hold that we lack jurisdiction to review the restraining order and the child custody order because Michael failed to file a timely appeal from those orders. Regarding the order for child support, spousal support, and attorney fees, we will hold that the trial court did make two errors in calculating Michael's income. First, it treated payments that Michael was making to buy out his former partners (namely, his ex-wife and her father) as income to him, even though there was some evidence that these payments were made for bona fide business reasons and there was no evidence that they were made to steer income to the ex-wife or away from Melissa. Second, it treated the "Net Ordinary Income" of Michael's business as income to him, despite uncontradicted evidence that this was merely a subtotal and that the true bottom-line "Net Income" of the business was actually a *loss*. We will also discuss Michael's other contentions, even though we reject them, for the guidance of the parties and the trial court on remand. Accordingly, we will reverse the order for child support, spousal support, and attorney fees and remand with directions.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Initial Filings and Motions.*

In May 2009, Melissa gave birth to a son by Michael. The couple got married in December 2010. In May 2012, they separated.

On May 22, 2012, in Indio, Melissa filed an application for a domestic violence restraining order.

Meanwhile, on June 1, 2012, in Riverside, Michael filed a petition for dissolution of marriage. At the same time, he also filed an ex parte application for child custody and visitation. On June 4, 2012, the trial court declined to grant Michael's application on an ex parte basis, but it set a hearing on an OSC.

On June 12, 2012, the two cases were consolidated.

On June 19, 2012, Melissa filed an OSC regarding child support, spousal support, and attorney fees. The trial court ordered the issues relating to the restraining order bifurcated from the issues related to Melissa's OSC and tried first.

On July 17, 2012, after two days of hearings, the trial court issued a restraining order against Michael. In an attachment to the restraining order, it gave Melissa legal and physical custody of the child, and it allowed Michael to have supervised visitation once a week for four hours.

On July 30, 2012, Michael's attorney substituted out, leaving Michael in pro per.

B. *The Initial Hearing.*

On August 29, 2012, the trial court held a hearing on Melissa's pending support OSC. The evidence at that hearing showed the following.

As of 2011, Michael owned one-third of MBD Properties, Inc. His "partners" in MBD were his ex-wife Becky and his ex-father-in-law, Duane. A K-1 showed that in 2011, Michael's share of MBD's profits was \$42,633 (an average of \$3,552.75 a month).

Michael also owned one-third of EXA, Incorporated, doing business as Exclusive Auto. EXA leased property from MBD. EXA paid rent to MBD; MBD then paid Michael. According to Michael, this income averaged \$4,000 a month.

As of 2012, however, Michael was "doing a buyout" with his partners. He was paying them \$150,000, in installments of \$1,250 per partner per month for 60 months. Also, according to Michael's bookkeeper, Samantha Lopez, MBD had given them a piece of property on which it had earned income in 2011. As a result, as of 2012, MBD no longer had income from that property, and Michael no longer had income from MBD.

Michael submitted two different profit and loss statements (P&L's) for EXA, both supposedly for 2011. They both showed the same total income, \$1,286,934. However, many of the expense figures were different. Thus, the first P&L showed a net profit of \$10,518. The second P&L showed a net profit of \$18,727.

Lopez explained that the first P&L had been prepared by Michael's ex-wife, Becky. ". . . Becky does not know how to do accounting. She never went to accounting school." For example, Becky would list all charges to the company's Capital One credit card under "Office Supplies."

In October, when taxes were due, Michael's tax preparer (who was Lopez's mother) "would break it down into categories." For example, a lot of the charges to the Capital One card actually belonged under "Advertising." The second P&L represented the first P&L as thus revised.

The first P&L showed an expense entitled "Officers Rent" in the amount of \$181,070.¹ Lopez testified that this included the payments to Michael of \$4,000 a month. It also included personal expenses that Michael had charged to the company's Capital One card.

¹ The second P&L showed a parallel expense simply entitled "Rent" in the amount of \$181,069.

Michael also submitted a P&L for EXA for January-July 2012.² It showed total income of \$739,857.53. The expenses shown included: (1) “Officers[’] Rent” of \$24,000; (2) payments to Becky and Duane of \$1,250 each per month; and (3) travel expenses of \$5,987.42. Subtracting total expenses from total income resulted in “Net Ordinary Income” of \$8,823.30.

On the second page of the P&L, however, several items of “Other Income” were shown as *negative* numbers, totaling -\$10,151.85.³ This was then used to reduce “Net Ordinary Income,” resulting in “Net Income” of -\$1,328.55.

Michael testified that in April 2012, he took a seven-day trip to Hawaii to attend classes at a convention. The expenses of the trip were treated as business expenses. He did not know where they were reflected on the P&L. His minor daughter from his first marriage went with him. He did not know who paid her expenses.

Melissa was unemployed. Before the marriage, however, she had worked as a dental hygienist.

² A copy of this P&L is attached to this opinion as Attachment A.

³ These items of “Other Income” were “Discount – Labor,” “Discount – Parts,” and “Discount – Sublet.” Thus, it appears that they were discounts given to customers which, as a result, reduced total (undiscounted) income.

Melissa owned a rental property in Redlands. Her equity in the property was approximately \$60,000. Her gross income from the property was \$1,495 a month. Out of this amount, she had to pay \$1,090 a month on the mortgage and \$150 a month to the property rental company, leaving her \$225 in net income. Melissa also had \$4,000 in a retirement account.

At the end of the hearing, the trial court took the matter under submission.

C. *The Trial Court's Initial Ruling.*

On September 25, 2012, the trial court issued a partial written ruling.

It found no evidence to support the imputation of income to Melissa.

It noted Michael's testimony that his only income was \$4,000 a month from EXA. However, it also noted that other exhibits, particularly bank statements, called this figure into question.⁴

Based on the evidence that in 2012, EXA had paid for Michael and his daughter from his first marriage to go to Hawaii for seven days, it concluded that "all o[r] a portion" of EXA's travel expenses were personal.

Finally, it raised questions about whether EXA was paying rent to Michael and about Michael's buyout of his partners. It therefore set a further hearing "for the purpose of the parties providing evidence on the items identified above."

⁴ Michael challenges the trial court's interpretation of these bank statements. We need not consider this issue, as the trial court's subsequent child support, spousal support, and attorney fee order was not based on the bank statements.

D. *The Final Hearing.*

On November 2, 2012, the trial court held the further hearing. Michael requested a continuance, but the trial court denied the request.

Michael was the only witness at the further hearing, and the trial court conducted all of the questioning.

Michael testified that EXA's business premises were owned by one Joe Magenheim. MBD was in the process of buying that property from Magenheim; Magenheim was carrying the loan. EXA paid rent of \$10,000 or \$12,000 a month to MBD. MBD then made a mortgage payment of \$6,018 a month to Magenheim and buyout payments totaling \$2,500 a month to Becky and Duane. MBD was supposed to pay Michael \$4,000 a month. Recently, however, EXA was not making enough to pay the full rent, and thus MBD was not able to pay Michael the full \$4,000.

If EXA made a profit, Michael received it at the end of the year, as wages, from which taxes were deducted.

Michael also testified that the purpose of the buyout was to "retire" Becky and Duane. He added that Duane had a brain tumor, which had delayed the consummation of the buyout, including the execution of deeds.

At the end of the hearing, the trial court took the matter under submission again.

E. *The Trial Court's Final Ruling.*

On January 4, 2013, the trial court issued its written final ruling.

It found that Michael paid \$2,108 in rent to MBD, and MBD paid \$6,018 to Magenheim.

It further found that, in connection with the buyout, Michael paid Becky and Duane \$2,500 a month “each.” It stated, “There did not appear to [be] any compelling reason requiring [Michael] to buy out their interest other than his decision to do so.”

The trial court noted that the P&L for January-July 2012 showed:

Officers' Rents	\$24,000.00
Becky	\$8,750.00
Duane	\$8,750.00
Travel	\$5,987.42
Ordinary Income	\$8,823.30

It concluded, “The total of the foregoing items is \$56,310.72, which amount constitutes cash flow that is available to [Michael] for the payment of support.” Dividing \$56,310.72 by the seven months covered by the 2012 P&L, it found that Michael's monthly income was \$8,044.

Based on these findings, it ordered Michael to pay Melissa temporary child support of \$1,426 a month, temporary spousal support of \$1,913 a month, and attorney fees in the amount of \$4,300.

II

RESTRAINING ORDER

Michael contends that the trial court erred by issuing a restraining order against him.⁵ Melissa responds that Michael failed to file a timely appeal from the restraining order. We agree.

The restraining order was entered on July 17, 2012. A restraining order is immediately appealable. (Code Civ. Proc., § 904.1, subd. (a)(6); *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1257-1258.) Michael’s notice of appeal, however, specified that he was appealing from the trial court’s order of January 4, 2013, which related solely to child support, spousal support, and attorney fees.

A notice of appeal must “identify[y] the particular judgment or order being appealed.” (Cal. Rules of Court, rule 8.100(a)(2).) Admittedly, “[t]he notice of appeal must be liberally construed.” (*Ibid.*) But “[d]espite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed.’ [Citation.]” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220

⁵ Part of his brief on this issue is cribbed, without citation or any other form of credit, from a journal article available on the internet. (Muller, et al., *Do Judicial Responses to Restraining Order Requests Discriminate Against Male Victims of Domestic Violence?* (2009) 24 J. Fam. Violence 625, available at <http://www.researchgate.net/publication/226759984_Do_Judicial_Responses_to_Restraining_Order_Requests_Discriminate_Against_Male_Victims_of_Domestic_Violence>, as of Dec. 18, 2014.)

Cal.App.3d 35, 47.) “““[W]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified — in either a single notice of appeal or multiple notices of appeal — in order to be reviewable on appeal.”” [Citation.]” (*Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171.)

Michael relies on Code of Civil Procedure section 906, which provides: “Upon an appeal pursuant to Section 904.1 . . . , the reviewing court may review the verdict or decision *and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . .*.” (Italics added.) The problem with this is that it further provides: “The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken.” As already discussed, the restraining order was, in itself, appealable.

Accordingly, we cannot review the restraining order in this appeal.

III

CHILD CUSTODY AND VISITATION ORDER

Michael contends that the trial court erred by awarding legal and physical custody of their son to Melissa. Once again (see part II, *ante*), Melissa responds that Michael failed to file a timely appeal from the custody order.

Assuming the custody order was appealable, then Michael failed to file a timely notice of appeal from it. The custody order was issued in the form of an attachment to the restraining order issued on July 17, 2012. As discussed in part II, *ante*, Michael's notice of appeal failed to specify that he was appealing from the restraining order *or* the custody order.

However, it is well established that a *temporary* custody order is interlocutory and nonappealable. (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1090.) It must be reviewed, if at all, by way of a writ petition. "A noncustodial parent who seeks to obtain custody will often be at a disadvantage by the time of trial if the child has bonded with the custodial parent. The noncustodial parent's only effective recourse is to obtain immediate review of any objectionable temporary custody order. This can be done by filing a petition for writ It cannot be done by filing an appeal which will sit in abeyance while the case works its way to trial and decision — and while the bond between child and custodial parent strengthens and deepens." (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 565.)

The custody order here was only temporary. A final custody order is normally made in a final judgment, or in an order after final judgment. (See *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377.) This custody order was issued at the outset of the case. Also, significantly, it was made in connection with a restraining order under the DVPA. ““There are important policy reasons why domestic violence orders should not be treated as the functional equivalent of final judicial custody determinations. Domestic violence orders often must issue quickly and in highly charged situations. The focus understandably is on protection and prevention, particularly where the evidence concerning prior domestic abuse centers on the relationship between current or former spouses. Treating domestic violence orders as de facto final custody determinations would unnecessarily escalate the issues at stake, ignore essential factors (such as the children’s best interest) and impose added costs and delays. It also may heighten the temptation to misuse domestic violence orders for tactical reasons.’ [Citation.]” (*Smith v. Smith, supra*, 208 Cal.App.4th at p. 1090.)

Michael therefore relies again (see part II, *ante*) on Code of Civil Procedure section 906. Given the preference for reviewing a temporary custody order by way of a writ, we question whether such an order can *ever* be reviewed in an appeal from a subsequent appealable order. In any event, while the custody order itself was nonappealable, the restraining order issued at the same time was appealable. Thus, the custody order could have been reviewed in a timely appeal

from the restraining order. Michael's failure to appeal from the restraining order bars him from belatedly challenging the custody order in this appeal. (See *Holt v. Holt* (1901) 131 Cal. 610, 611-612.)

IV

FAILURE TO POSE QUESTIONS TO LOPEZ INSTEAD OF MICHAEL

Michael contends that the trial court erred by not asking his bookkeeper, Samantha Lopez, the same questions it asked him.

A. *Additional Factual and Procedural Background.*

At the start of the initial support hearing, on August 29, 2012, both Michael and Melissa were sworn in.

At the trial court's request, Melissa's counsel gave an opening statement, basically pointing out what she considered to be anomalies in Michael's financial documents.

The trial court asked Michael to "comment." He responded to some of the issues that Melissa's counsel had raised. However, he also said, "All of the financial stuff that is in here, I know nothing about" He noted that his bookkeeper, Samantha Lopez, was present, "just to testify to any questions because I have zero knowledge of anything." "She knows every single aspect of the financials." "I don't want to testify to it because I'm only saying what she is telling me because I know nothing about it." "I would really request that she

would be put up on the stand.” The trial court then posed specific questions to Michael, to which he responded.

After a brief recess, Michael volunteered, “I just want to say one thing. From speaking with my bookkeeper, she can see that I was not explaining it well and like frustrating the Court [and] confusing the Court. I want to apologize for all of that.” He continued, “Samantha is here. She can explain everything so easily, and that is her purpose of being here.”

The trial court responded, “Sounds good to me. Let me finish up with a couple of questions to you.” Accordingly, it asked Michael a few more questions, to which he responded.

The trial court then allowed Melissa’s counsel to cross-examine Michael. In response to one question, he said, “[A]gain, that’s why Samantha is here. She can explain all of that.”

The trial court asked Melissa a few questions, which she answered.

At that point, the trial court did call Lopez as a witness. It asked her questions, which she answered. When it was finished, there was this colloquy:

“THE COURT: Mr. Proud, any questions for Ms. Lopez?

“MR. PROUD: No questions other than the fact that she knows how to —

“THE COURT: No. It’s just questions. If you don’t have any, let me ask [counsel for Melissa].

“Do you have any questions for Ms. Lopez?

“[COUNSEL FOR MELISSA]: Yes.”

After Melissa’s counsel questioned Lopez, and after the trial court asked Lopez a few more questions, the trial court allowed Michael to question her. He asked her only one question.

B. *Analysis.*

Michael complains that, when he was on the stand, he asked the trial court to question Lopez instead of him, but it did not do so. Melissa and the court, however, were entitled to exhaust all the questions that they had for Michael before Lopez was called to the stand. In any event, even if this could be viewed as error, it was clearly harmless, as long as Michael was given a subsequent opportunity to ask Lopez those same questions.

Michael also complains that the trial court asked him if he had any questions for Lopez but cut him off before he could respond. Specifically, he said, “No questions other than the fact that she knows how to — .” The trial court could reasonably interpret this as meaning that he had no questions and merely wanted to make a statement. If he did have questions, he could have politely corrected the court. In any event, once again, if this was error, it was harmless because the trial court gave him a second opportunity to question Lopez. When it did so, however, he asked Lopez only one question.

Finally, Michael complains that, because he was in pro per, he “didn’t understand what was happening” and “didn’t know if he should interrupt the judge

or wait.” “His contention . . . ignores the edict that propria persona litigants are held to the same standard as parties represented by trained legal counsel.

[Citation.]” (*Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1527.)

Thus, Michael has not shown any error regarding the examination of Lopez.

V

THE DENIAL OF A CONTINUANCE

Michael contends that the trial court erred by refusing to grant him a continuance of the further support hearing.

A. *Additional factual and procedural background.*

As mentioned, on September 25, 2012, the trial court set a further hearing to clarify specified issues.

At the further hearing, on November 2, 2012, Melissa’s counsel noted that she had served Michael with a notice to appear and produce documents (see Code Civ. Proc., § 1987, subds. (b), (c)), but he had not produced any documents.

Michael asserted that he had produced some documents, but that full compliance with the notice by the date of the hearing was “impossible.” He then said: “. . . I need to ask for a continuance to do a full discovery. I’m in the process of obtaining counsel right now to help me with that for my own discovery and to answer [Melissa’s] discovery that she wants, which is fine, but I need more time.”

The trial court responded, “I want to get answers to the questions that I had raised with my ruling, and after I get those answers, I will answer whether I’m going to give Mr. Proud his continuance and address the items on the [notice] to appear and produce.” Accordingly, it started questioning Michael. Soon, however, he interrupted and said, “I . . . need more time, so I can get counsel . . . and so I can serve discovery and also finish up with discovery as well.”

At that point, the trial court denied a continuance.

B. *Analysis.*

“Continuances are granted only on an affirmative showing of good cause requiring a continuance. [Citations.] Reviewing courts must uphold a trial court’s choice not to grant a continuance unless the court has abused its discretion in so doing. [Citation.]” (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) The trial court can consider the requesting party’s diligence (or lack thereof). (*In re Marriage of Teegarden* (1986) 181 Cal.App.3d 401, 406.)

Here, Michael did not explain why he had not requested a continuance by noticed motion before the hearing.⁶ He also did not explain why he had not

⁶ A week before the hearing, Michael did file a peremptory challenge to the trial judge, which was denied as untimely.

According to his brief, he “expect[ed] that the hearing . . . would *either* be in front of a different judge, *or* that he would obtain a continuance.” (Italics added.) Thus, implicitly, he admits that he could have been prepared to proceed, as long as the hearing was before a different judge.

retained counsel before the hearing. While he did argue that Melissa's notice to produce documents was burdensome, evidently he did not serve any objection to it; if he had, she would have had to file her own noticed motion to compel production. (See Code Civ. Proc., § 1987, subd. (c).)

Michael now claims that he needed more time to locate documents that would have affirmatively supported his position, such as his 2012 tax return, business travel expense documents, and documents showing that he had received a home loan modification. However, he did not raise this argument below; he merely argued that he needed more time "for my own discovery and to answer [Melissa's] discovery" Also, he does not explain why September 25 to November 2 was not enough time to locate such documents, which were presumably already in his possession.

Thus, Michael has not shown that it was an abuse of discretion to deny his request for a continuance.

VI

THE CALCULATION OF MICHAEL'S INCOME

Michael raises a number of issues arising out of the trial court's calculation of his income for support purposes as the sum of (1) "Officers' Rents," (2) the buyout payments to Becky and Duane, (3) travel expenses, and (4) "Ordinary Net Income."

A. *General Legal Principles*

An award of temporary child support and/or temporary spousal support is immediately appealable. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368-369.) An award of pendente lite attorney fees is likewise immediately appealable. (*In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119.)

A child support calculation “is predicated on each parent’s ‘net monthly disposable income’ [citation], which has been characterized as the ‘key financial factor’ in the formula. [Citation.]” (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2014) Support, ¶ 6:195.)

Similarly, in calculating spousal support, the trial court must consider each spouse’s earning capacity; income is the primary indicator of earning capacity. (Fam. Code, § 4320, subd. (c); *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 301.) The computer software authorized by the Judicial Council for use in calculating not only child support but also spousal support works off of the net monthly disposable income of each parent. (Cal. Rules of Court, rule 5.275(b).)

“‘[N]et monthly disposable income’ is a product of each parent’s ‘annual gross income’ [citation] adjusted by allowed ‘deductions’ to yield ‘annual net disposable income’ [citation] and then divided by 12 [citation]. [Citations.]” (Hogoboom & King, *supra*, Support, ¶ 6:195.)

“The guideline formula does not factor in parental *discretionary* spending (e.g., cars, homes, food, clothing, etc.) [Citations.] [¶] The guideline *does*, however, subtract the ‘actual amounts attributable to’ specified *nondiscretionary* (*unavoidable*) expenses from annual gross income to determine each parent’s ‘annual net disposable income.’ [Citations.] [¶] The categories of allowable deductions from gross income are specific and *narrowly construed*. [Citations.]” (Hogoboom & King, *supra*, Support, ¶ 6:212.)

In calculating the income of a parent who owns a business, the court should look at “gross receipts from the business reduced by expenditures required for the operation of the business.” (Fam. Code, § 4058, subd. (a)(2).)

“A parent who owns a successful business and has control of his or her income is able to structure income and the payment of personal expenses through the business to depress income; in effect, the parent can depress income in an attempt to minimize child support obligations. Under these circumstances, a court may properly consider the business-paid personal expenses in determining the parent’s gross income for the child support calculation. [Citations.]” (Hogoboom & King, *supra*, Support, ¶ 6:205.5.)

“Awards of child support and spousal support are reviewed for abuse of discretion. [Citation.]” (*In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1312.) “The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under

review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

B. "Officers' Rents."

Michael does not seriously challenge the finding that the \$24,000 in "Officers['] Rents," as shown on the January-July 2012 P&L, constituted his income from MBD and/or EXA. This would work out to \$3,428.57 a month.

Michael does argue that the trial court should have considered MBD's K-1, which showed that in 2011, his share of MBD's profits was \$3,552.75 a month. Lopez testified, however, that by 2012, MBD was no longer making any payments to Michael.

Michael also points to his own testimony that he made about \$4,000 a month. As this figure is higher than the \$3,428.57 a month that the trial court actually used, we cannot see how he was prejudiced.

In addition, Michael argues that the trial court failed to recognize that his income fluctuated. However, he testified, "I'm given a check for \$4,000 a month. That's the way it's been for the last five years." "Some months it fluctuates up and down, but overall, . . . [it] is less than \$4,000 a month." That is consistent with the trial court's finding.

C. *The Buyout.*

Michael contends that the trial court erred by finding that the amounts that he was paying to buy out his partners constituted income to him.

The trial court's finding that Michael paid Becky and Duane \$2,500 a month "each" was clearly erroneous. The evidence showed that he paid them \$1,250 a month each, for a *total* of \$2,500 a month. The error, however, was merely typographical, and not an error of substance, since the trial court added only \$2,500 a month to Michael's income on this basis.

The trial court, however, also erred by treating these payments as income, based on its finding that there was no "compelling reason" for the buyout. Legally, the issue was whether the buyout payments were "expenditures required for the operation of the business" (Fam. Code, § 4058, subd. (a)(2)), as opposed to expenditures made to depress Michael's apparent income. Admittedly, the contours of the buyout were extremely vague. However, there was uncontradicted evidence that there was, in fact, some kind of buyout agreement; some real property had been conveyed, and other deeds had yet to be signed. Thus, there was no basis for a finding that the buyout payments remained part of Michael's discretionary income that he could redirect to support.

There was no indication that the buyout was not bona fide. Moreover, there was no indication that Michael was using the buyout to depress his income or to steer income away from Melissa and toward his ex-wife. The only way this could have been double-checked was by looking at what he got in exchange for the buyout. If he paid \$2,500 a month in exchange for assets that did or could generate substantially less than \$2,500 a month, that would be some evidence that he was manipulating his income. However, if he paid \$2,500 a month in exchange for assets that did or could generate \$2,500 a month or more, there would be no reason to treat the buyout payments as income (although the return on those assets could certainly be treated as income).

Unfortunately, even though the trial court indicated in its initial ruling that it needed more information about the buyout, it asked only a handful of questions about the buyout at the further hearing, and it never asked Michael what he got in the buyout. All it learned was that the purpose of the buyout was to “retire” Becky and Duane, and that Duane had a brain tumor. Nevertheless, it declared, “The questions that I had have now been answered.” This would have led Michael to believe that he did not need to introduce evidence of what he got in the buyout.

We therefore conclude that the trial court’s finding that the buyout payments constituted income was not supported by substantial evidence.

D. *Travel Expenses.*

Michael contends that the trial court erred by treating EXA's travel expenses as income.

Here, the 2012 P&L showed that EXA had \$5,987.42 in travel expenses. Michael testified that in April 2012, he had taken classes at a convention in Hawaii. There was no evidence as to the nature of the classes (except for Michael's claim that they were business-related) or as to how much of the trip was spent in class. He admitted, however, that his 11-year-old daughter from a previous marriage went with him. The trial court could reasonably conclude that he was choosing to take trips that could be treated as business expenses in order to depress his income.

E. *Net Ordinary Income.*

Michael contends that the trial court erred by treating EXA's "Net Ordinary Income" as income to him.

Michael argues that this was "floating income," which EXA had to retain to stay in the black. However, he testified, to the contrary, that at the end of the year, any profit that EXA made was disbursed to him as wages.

Michael also argues that EXA actually had a net loss. This time, we agree. Looking only at page 1 of the P&L, the proverbial "bottom line" showed net ordinary income of \$8,823.30. Page 2 of the P&L, however, made further subtractions from net ordinary income to arrive at the *true* bottom line, which was

a net *loss* of \$1,328.55. Thus, there was no evidence that any of the \$8,823.30 in net ordinary income was available to Michael to pay support.

F. *EXA's Rent Payments.*

Michael complains about the trial court's finding that EXA paid MBD \$2,108 a month in rent. The evidence showed that the correct figure was somewhere between \$10,000 and \$15,000. But, once again, the error was harmless. Michael never explains how the erroneous figure affected the trial court's calculation of his income. As far as we can see, it did not.

VII

MELISSA'S EARNING CAPACITY AND ASSETS

A. *Melissa's Earning Capacity.*

Michael contends the trial court erred by failing to consider Melissa's earning capacity.

In calculating child support, the trial court has discretion to consider the earning capacity of a parent in lieu of the parent's income, if consistent with the best interests of the child. (Fam. Code, § 4058, subd. (b).)

“There are very few . . . published appellate decisions which have upheld the imputation of income to custodial parents. [Citations.] The reason is pretty obvious. Since the child support statutes expressly state the purpose of California's guideline child support system is to ‘place the interests of children as the state's top priority,’ [citation], it is counterintuitive — often counterproductive

— to impute income to a custodial parent, because the objective effect of such an imputation will be to reduce the money otherwise available for the support of any minor children.” (*In re Marriage of Ficke* (2013) 217 Cal.App.4th 10, 18-19.)

Here, Melissa was the sole custodial parent of a three-year-old child. While there was some evidence that she could work as a dental hygienist, there was no evidence as to how much she could earn. A fortiori, there was no evidence that, if she did go back to work, that would be consistent with the best interest of the child. The trial court could reasonably conclude that it would not.

Similarly, in calculating spousal support, the trial court is supposed to consider, among other things, “[t]he ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.” (Fam. Code, § 4320, subd. (g).) As just discussed, the trial court could reasonably conclude that Melissa could not work without interfering with the interests of the child. The trial court is also supposed to consider “the standard of living established during the marriage” (Fam. Code, § 4320, subd. (a).) Here, during the marriage, Melissa took care of the child and did not work.

Thus, the trial court did not err by declining to impute income to Melissa.

B. *Melissa's Assets.*

Michael also argues that the trial court failed to consider Melissa's assets.

The trial court did consider Melissa's rental property; it found that the property generated net income of \$225 a month, and it included that in its support calculations. If it had also considered the equity in the property as an asset, it would have been double-counting. Melissa could not sell the property and yet still continue to enjoy the income from it.

The trial court could properly decline to consider Melissa's \$4,000 retirement account as de minimis, particularly as she would have had to pay taxes and penalties on any withdrawals.

VIII

DISPOSITION

The appeal, to the extent that it challenges the July 17, 2012 restraining order and child custody and visitation order, is dismissed.

The January 4, 2013 child support, spousal support, and attorney fee order is reversed. The trial court is directed to reconsider and redetermine these issues nunc pro tunc.

In the interest of justice, each side shall bear its own costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.

ATTACHMENT A

3:04 PM
08/17/12
Cash Basis

Exclusive Auto Inc Profit & Loss January through July 2012

	Jan - Jul 12
Ordinary Income/Expense	
Income	
Labor Revenue (non-tax)	261,307.96
Labor Revenue (taxable)	55,375.41
Parts Revenue (non-tax)	7,933.77
Parts Revenue (taxable)	393,412.28
Returns & Allowances	-1,939.25
Shop Supplies Revenue (taxable)	1,712.08
Sublet Revenue (non-tax)	21,616.33
Sublet Revenue (taxable)	159.00
Vending Machine Income	25.95
301 - Income Oil	254.00
Total Income	739,857.53
Cost of Goods Sold	
400 - Cost of Goods	212,915.61
503 - Subcontracted Services	7,189.92
505 - Merchant Check Fees	560.06
506 - Merchant Credit Card Fees	10,806.84
Total COGS	231,472.43
Gross Profit	508,385.10
Expense	
Bad Debt	0.10
Officers Rent	24,000.00
Public Relations	240.00
1000 - Becky	8,750.00
1001 - Duane	8,750.00
1030 - Interest Income	-1.81
182 - Dues and Subscription	998.00
502 - Payroll Taxes Expense	22,416.76
504 - Automobile Expense	11,757.42
507 - Bank Service Charges	131.62
508 - Advertising and Promotion	40,782.19
510 - Computer and Internet Expenses	4,848.61
512.1 - Auto Insurance	4,709.37
514 - Health Insurance	16,121.66
515 - Workers Comp	11,432.00
516 - Life Insurance	606.36
518 - Interest Expense	4,066.16
519 - Laundry	2,705.80
520 - Office Supplies	9,021.33
521 - Postage	851.38
522 - Promotional	707.70
523 - Repairs and Maintenance	4,705.13
524 - Rent Expense	54,626.79
525 - Security	429.93
526 - Wages	220,597.78
528 - Franchise Tax Board	1,600.00
529 - Travel	5,987.42
529.8 - Property Taxes	4,646.08
531 - Cell Phone/Telephone	1,507.79
532 - Utilities	8,649.18
533 - Meals and Entertainment	1,279.27
535 - Legal and Accounting	19,702.82
550 - Education	2,934.96
Total Expense	499,561.80
Net Ordinary Income	8,823.30

3:04 PM
08/17/12
Cash Basis

Exclusive Auto Inc
Profit & Loss
January through July 2012

	<u>Jan - Jul 12</u>
Other Income/Expense	
Other Income	
Discount - Labor	-8,991.85
Discount - Parts	-844.00
Discount - Sublet	-316.00
Total Other Income	<u>-10,151.85</u>
Net Other Income	<u>-10,151.85</u>
Net Income	<u><u>-1,328.55</u></u>